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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 8/2018 concerning Mr. N (whose name is known by the Working Group) (Japan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 21 December 2017, the Working Group transmitted to the Government of Japan a communication concerning Mr. N. The Government submitted a late response to the communication on 6 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. N is a citizen of Japan residing in Tokyo. The source reports that Mr. N had previously been treated for schizophrenia for 15 years.

5. According to the source, on 19 July 2017, Mr. N went to buy cigarettes at a barbecue house situated near his residence. After being told that he could not buy tobacco, Mr. N tried to steal a soft drink. The staff of the barbecue house noticed his actions and called the police.

6. The source states that Mr. N was then arrested by officers from a police station of the Metropolitan Police Department. The officers did not show a warrant or any other decision issued by a public authority. Mr. N was then taken to a police station.

7. It is reported that the authorities transferred Mr. N by helicopter from the police station to Tokyo Metropolitan Matsuzawa Hospital. On the following day, Mr. N was subjected to involuntary committal at this hospital. He has no recollection of whether a doctor diagnosed him and received no explanation concerning his involuntary committal.

8. According to the source, Mr. N's detention was ordered by the Governor of Tokyo under article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950).

9. The source states that, following Mr. N's transfer to Matsuzawa Hospital, his form of hospitalization was changed from "involuntary admission based on dangerousness" to "involuntary admission based on incompetency". The source recalls that "involuntary admission based on incompetency" is one of the forms of compulsory hospitalization that require the consent of a designated physician and of the family of the individual concerned.

10. The source further submits that article 38 (4) of the Act on Mental Health and Welfare for the Mentally Disabled stipulates that a person hospitalized in a psychiatric hospital, or his or her family members, can request the Governor of the Prefecture to grant him or her permission to leave the hospital. On 24 August 2017, Mr. N requested to be discharged from the hospital. That request was reportedly denied.

11. The source adds that, according to the results of a survey conducted by the Ministry of Health, Labour and Welfare in 2016, only 4.3 per cent of requests for discharge were granted on the basis of "inappropriate hospitalization or treatment". In addition, the authorities view the step of taking into account the opinion of the individual concerned as being optional and decisions to hospitalize an individual cannot be appealed against.

12. According to the source, on 30 October 2017, Mr. N was transferred from Matsuzawa Hospital to Koganei Hospital in Tokyo, where he remains to date. Reportedly, the current form of hospitalization in his regard is "voluntary committal". However, Mr. N is unable to freely leave the hospital and there is no concrete plan to discharge him. It is thus alleged that Mr. N continues to be subjected to indefinite detention.

13. The source submits that the deprivation of liberty of Mr. N lacks legal basis and is discriminatory, given that he has a psychiatric disorder. The source therefore argues that his detention is arbitrary according to categories I and V.

14. In relation to category I, the source argues that the requirements for compulsory hospitalization are not satisfied in the present case and that, therefore, the hospitalization of Mr. N has no legal basis and is illegal. The source specifies that, according to article 29 (1) of the Act on Mental Health and Welfare for the Mentally Disabled, persons with psychiatric disorders will be forcibly admitted to a hospital if there is a danger of them harming themselves or others due to their psychiatric disorders unless they are hospitalized for medical care and protection.

15. The source argues that the criminal act committed by Mr. N was an attempted theft caused by self-interest and not by his psychiatric disorder. Mr. N did not commit the act of attempted theft while suffering from delusions of persecution or auditory hallucinations. Therefore, the source submits that there is no causal relationship between Mr. N's

psychiatric disorder and his criminal act. The source thus asserts that the deprivation of his liberty does not fulfil the requirement of article 29 (1) of the Act on Mental Health and Welfare for the Mentally Disabled.

16. The source submits that, under national criminal procedure, in the case of an attempted theft, the arrest and detention of a suspect (except when arresting an offender in flagrante delicto without an arrest warrant) are permitted only when based on a warrant issued by a judge under certain conditions at a certain stage of the criminal investigation. Furthermore, when suspects are detained, it is mandatory for judges to hear them directly. Should a suspect request that the grounds for his or her detention be disclosed, the court must do so in a public hearing. In the case of attempted theft, suspects have the right to be provided with legal counsel from the beginning of their detention. Those procedural guarantees of due process are stipulated in articles 31 and 33–34 of the Constitution of Japan. However, the case of Mr. N was reportedly handled in line with the procedure outlined in the Act on Mental Health and Welfare for the Mentally Disabled.

17. The source notes that Mr. N has been detained through compulsory hospitalization without a judicial procedure. From the standpoint of criminal proceedings, the detention of Mr. N lacks a legal basis, as the authorities did not follow the proper procedure.

18. In relation to category V, the source argues that Mr. N was deprived of his right to a criminal trial with due process guarantees. The source reiterates that Mr. N committed the crime not because of his psychiatric disorder but because of self-interest and that, therefore, his case should have been dealt with through criminal proceedings. The source thus submits that depriving Mr. N of criminal proceedings constitutes discrimination based on his disability.

19. The source submits that the authorities have violated articles 5, 12 and 14 of the Convention on the Rights of Persons with Disabilities, which Japan ratified on 20 January 2014 and which contains clauses prohibiting discrimination. The source also submits that the authorities have violated article 26 of the International Covenant on Civil and Political Rights.

20. The source further submits that Mr. N was deprived of his right to a fair trial, provided for under article 14 (1) of the Covenant. He was also deprived of a judicial procedure, contrary to article 13 of the Convention on the Rights of Persons with Disabilities.

21. Moreover, the source argues that Mr. N had no previous criminal record and that the attempted theft in the present case would have led to insignificant damage to property that he himself could have compensated. Therefore, there was a high possibility that the Public Prosecutor would have entered a nolle prosequi. Were Mr. N to have been prosecuted, it is high likely that his sentence would have been suspended or relatively short in length. The source thus argues that, if Mr. N had faced criminal proceedings, he would not currently be deprived of his liberty.

22. According to the source, guidelines for staff involved in the revision and enforcement of the Act on Mental Health and Welfare for the Mentally Disabled stipulate that careful consideration must be given to the substantive nature, and the extent of, the infringement when judging the need for hospitalization. Also, the force exercised on patients should be kept to the necessary minimum. The source submits that, in the case of Mr. N, there was no careful consideration of the need for compulsory hospitalization. His crime was a crime against property and would not have harmed anyone. The degree of material damage caused by his act was also very small. The source asserts that confining Mr. N in a protection room went beyond the necessary minimum level of force and ignored the principle of proportionality.

23. According to the source, in Japan, inpatient wards are generally not locked and only psychiatry wards may be locked under article 16 (1) (vi) of the Ordinance for Enforcement of the Medical Care Act (Ministry of Health, Labour and Welfare Ordinance No. 50). More than 53 per cent of voluntarily hospitalized patients are placed in locked psychiatry wards. Approximately 94 per cent of all patients are hospitalized in locked wards, including patients who are in a locked ward only at night.

24. The source notes that Mr. N was hospitalized in a locked ward and was unable to freely leave. It is argued that there was a lack of adequate consideration given to the substance of the criminal act committed by Mr. N, a person with a psychiatric disorder. The source argues that Mr. N was only detained because he has a psychiatric disorder.

Response from the Government

25. On 21 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 20 February 2018, detailed information about Mr. N's current situation and any comments on the source's allegations.

26. On 6 March 2018, the Working Group received a request for extension of the time limit from the Government. The Working Group notes that, in accordance with paragraphs 15 and 16 of its methods of work, any such requests must be submitted within the original deadline set by the Working Group. In the present case, the request was submitted some two weeks after the expiration of the original deadline of 20 February 2018 and was therefore denied.

27. The Government of Japan nevertheless submitted a reply on 6 April 2018. That reply was some six weeks late and therefore the Working Group cannot accept it as if it had been presented within the time limit.

Discussion

28. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

29. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

30. The Working Group would like to stress that the procedural rules for handling communications from sources and responses of Governments are contained in its methods of work and in no other international instrument that the parties might consider applicable. In that regard, the Working Group would like to clarify that, in its methods of work, there is no rule applicable that impedes the consideration of communications due to the lack of exhaustion of domestic remedies in the country concerned. Therefore, sources have no obligation to exhaust domestic remedies before sending a communication to the Working Group.[1]

31. The Working Group notes that Mr. N was initially detained by the police on 19 July 2017 following the attempted theft of a soft drink from a barbecue house. During that incident there were no reported altercations between Mr. N and the barbecue house personnel or between Mr. N and the police. There are no allegations that Mr. N suffered from any medical episode at the time of the attempted theft, or that he was violent. The Working Group also notes that the Government of Japan has chosen not to rebut those submissions, even though it had the opportunity to do so.

32. The Working Group therefore concludes that the only reason for the initial arrest of Mr. N could have been the theft of the can of drink, which cannot be regarded as a serious criminal offence. Nevertheless, since Mr. N was caught in the act of stealing, the Working Group accepts that the police may have been right to arrest him and that the arrest could have taken place without a warrant on the grounds that he was caught in flagrante delicto.

33. However, following his initial arrest, Mr. N was transferred by police to Tokyo Metropolitan Matsuzawa Hospital and subjected to involuntary committal at this hospital.

[1] See, for example, opinions No. 38/2017; No. 19/2013 and No. 11/2000.

This involuntary hospitalization allegedly took place on the basis of article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950). The Working Group notes that the Government has chosen not to challenge those submissions, even though it had the opportunity to do so.

34. The Working Group observes that arbitrary detention can occur not only in criminal justice settings but also in health-care settings, such as psychiatric hospitals and other institutions where individuals may be deprived of their liberty. As the Working Group has stated in its most recent annual report, the deprivation of personal liberty occurs when a person is being held without his or her free consent.[2] In the present case, Mr. N has been unable to leave the hospital, even though he wishes to do so; therefore his involuntary hospitalization constitutes deprivation of liberty in the view of the Working Group.

35. The Working Group notes that article 9 of the Covenant requires that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by national law. In the present case, the Working Group observes that article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950) permits hospitalization only when two or more designated mental health doctors have made the same judgment that the person in question has a psychiatric disorder and that he or she could harm himself or herself or others due to his or her psychiatric disorder unless he or she is hospitalized for medical care and protection. In such a case, the Governor of the Prefecture shall inform the person in question, in writing, of the fact that he or she is to be involuntarily admitted.

36. Without making any assessment of the compatibility of the above-mentioned provisions of the Act on Mental Health and Welfare for the Mentally Disabled with the international human rights obligations of Japan, it appears obvious to the Working Group that those provisions were not followed during the involuntary hospitalization of Mr. N. First, the initial detention of Mr. N was carried out by the police following a reported theft, and not on the basis of a decision made by a designated doctor who had previously assessed Mr. N's health. Second, upon Mr. N's transfer to the hospital, he was not examined by at least two designated doctors with a view to ascertaining whether his hospitalization was necessary, as clearly required under national legislation. Third, Mr. N was not notified, in writing, of the need for involuntary admission. Consequently, his involuntary admission to Tokyo Metropolitan Matsuzawa Hospital disregarded all the prescriptions of article 29 of the Act on Mental Health and Welfare for the Mentally Disabled (Act No. 123 of 1950). The Working Group notes that the Government of Japan has chosen not to challenge any of those submissions.

37. The Working Group recalls that is not sufficient that a law exists that may justify the detention of a person; the authorities must invoke that law in the individual circumstances and do so in compliance with the procedure prescribed by that law.[3] In the present case, while article 29 of the Act on Mental Health and Welfare for the Mentally Disabled may have justified the deprivation of liberty of Mr. N, the failure of the Japanese authorities to follow the procedure prescribed in that law means that they cannot point to the provisions of the Act as the legal basis justifying the deprivation of liberty. In other words, the Working Group concludes that the authorities of Japan failed to respect national legal provisions in relation to the involuntary hospitalization of Mr. N and thus also breached article 9 of the Covenant, which specifically requires that any detention be carried out in accordance with the law.[4]

38. The Working Group wishes to underline that any instance of deprivation of liberty, including internment in psychiatric hospitals, must meet the standards set out in article 9 of the Covenant. The Working Group, in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, states that, where a person with a disability is deprived of his or her liberty through any process, that person is, on an equal basis with others, entitled to

[2] See A/HRC/36/37, para. 51; A/HRC/30/37, para. 9; and opinion No. 68/2017.
[3] See, for example, opinions No. 75/2017, No. 66/2017 and No. 46/2017.
[4] See opinion No. 68/2017.

guarantees in accordance with international human rights law, necessarily including the right to liberty and security of person, reasonable accommodation and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities. A mechanism complete with due process of law guarantees shall be established to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent. Such reviews are to include the possibility of appeal.[5]

39. The Working Group observes that all such due process guarantees were absent in relation to the involuntary hospitalization of Mr. N, in a further breach of article 9 of the Covenant.

40. The Working Group recalls that, according to the Basic Principles and Guidelines, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[6] That right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty, as well as to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[7] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[8]

41. The Working Group notes that those provisions were plainly ignored in the case of Mr. N, as he was unable to challenge the legality of his involuntary admission to Tokyo Metropolitan Matsuzawa Hospital.

42. Moreover, the Working Group notes that, on 30 October 2017, Mr. N was transferred to Koganei Hospital and his status was changed to that of "voluntary hospitalization". The Working Group observes that Mr. N denies having consented to such hospitalization, and that the Government has failed to produce any evidence to the contrary, although it had the possibility to do so. The Working Group must, therefore, conclude that the hospitalization of Mr. N in Koganei Hospital was not voluntary and that he has therefore been in continuous involuntary hospitalization since 19 July 2017. The Working Group notes that, throughout those nine months, the involuntary hospitalization of Mr. N was not subject to any reviews by an independent authority that would ascertain the need for and appropriateness of involuntary hospitalization and the proportionality of that measure given the individual circumstances of the case. That situation is a further clear breach of article 9 (4) of the Covenant.

43. The Working Group concludes that the involuntary hospitalization of Mr. N on 19 July 2017 and his continued internment in hospital are arbitrary and fall under category I, as they were not carried out in accordance with the procedure established by national law and therefore lacked the requisite legal basis, and did not provide for the requisite due process guarantees, given that Mr. N was not able to challenge the legality of his detention.[9]

44. The source has also submitted that the detention of Mr. N falls under category V, since his involuntary hospitalization was discriminatory, being carried out on the basis of his psychiatric disorder. The Working Group notes the absence of a timely reply from the Government in relation to that allegation.

45. The Working Group also notes that Japan has been a party to the Convention on the Rights of Persons with Disabilities since 20 January 2014. The Working Group reiterates

[5] See A/HRC/30/37, paras. 104–105.
[6] Ibid., paras. 2–3.
[7] Ibid., para. 47 (a).
[8] Ibid., para. 47 (b).
[9] See also opinion No. 68/2017.

that it is contrary to the provisions of article 14 of the Convention to deprive a person of his or her liberty on the basis of disability.[10] Moreover, as stated in the Basic Principles and Guidelines, the involuntary committal or internment of persons on the grounds of the existence of an impairment or perceived impairment is prohibited.[11]

46. The Working Group once again wishes to emphasize that Mr. N was initially detained for the minor offence of attempted theft of a can of carbonated drink. Neither at the time of his detention nor prior to that there is any evidence of Mr. N being violent or otherwise presenting a danger to himself and/or to others. His subsequent transfer to Tokyo Metropolitan Matsuzawa Hospital had no connection to the initial incident of attempted theft. It is therefore clear to the Working Group that the deprivation of liberty of Mr. N was carried out purely on the basis of his psychiatric disorder, and was thus discriminatory. The Working Group therefore concludes that Mr. N's detention and his subsequent internment in Tokyo Metropolitan Matsuzawa Hospital and Koganei Hospital were discriminatory and fall under category V.

47. The Working Group refers the present case for further consideration to the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

48. The Working Group would welcome the opportunity to work constructively with the Government of Japan to address its serious concerns relating to arbitrary deprivation of liberty. On 30 November 2016, the Working Group sent a request to the Government to undertake a country visit and welcomes the engagement of the Government through the meetings the Working Group has held with the Permanent Mission of Japan to the United Nations Office and other international organizations in Geneva to discuss further the possibility of such a visit. On 2 February 2018, the Working Group sent a further request to the Government to undertake a country visit and hopes that it will receive a positive response from the Government as a sign of its willingness to enhance its cooperation with the special procedures of the Human Rights Council.

Disposition

49. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mr. N, being in contravention of articles 2, 3, 6, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and V.

50. The Working Group requests the Government of Japan to take the steps necessary to remedy the situation of Mr. N without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

51. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. N immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

52. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. N and to take appropriate measures against those responsible for the violation of his rights.

53. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on disability and the Special Rapporteur on health.

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[10] See A/HRC/36/37, para. 55; opinion No. 68/2017; and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 19.

[11] See A/HRC/30/37, para. 103.

Follow-up procedure

54. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. N has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. N;

(c) Whether an investigation has been conducted into the violation of Mr. N's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Japan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

55. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

56. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

57. The Government should disseminate through all available means the present opinion among all stakeholders.

58. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken. [12]

[*Adopted on 19 April 2018*]

[12] See Human Rights Council resolution 33/30, paras. 3 and 7.